LOH CHOW SANG & ANOR

v.

MERU VALLEY RESORT BHD

HIGH COURT MALAYA, IPOH
ABDUL HAMID EMBONG J
[CIVIL SUIT NO: 12-200-00]
17 JULY 2001

CIVIL PROCEDURE: *Summary judgment - Triable issues - Housing developer - Sales and purchase agreement - Failure to complete house within stipulated time - Submissions that Contracts Act 1950 to be read into agreement and time was not of the essence - Whether constituted triable issues - Whether summary appropriate - Subordinate Courts Rules 1980 O. 26A*

On 5 July 1995, the appellants executed a sales and purchase agreement ('SPA') with the housing developer respondent for the purchase of a house to be constructed by the respondent in a certain housing scheme ('the project'). It was a term of the SPA, drafted as it were according to Schedule G, Housing Developers (Control and Licencing) Regulations 1989, that the respondent would hand over vacant possession of the house within 24 months thereof. In November 1995, the respondent however abandoned the project. It was not until August 1997 that the project was revived, when the respondent came under a new team of shareholders and management.

The appellants did not complain about the respondent's delay then and continued to pay the progress payments for the house to the respondent. However, when the respondent handed over vacant possession of the house on 10 April 1999, the appellants complained that the respondent was late by 644 days and was liable for late delivery. The appellants then filed a claim for RM36,698.62 against the respondent for liquidated damages, and subsequently applied for summary judgment under O. 26A Subordinate Courts Rules 1980. Summary judgment was however refused whereupon the appellants appealed.

Held:

[1] A plaintiff will only succeed in obtaining summary judgment in cases of undoubted certainty. What a defendant needs to do is to show cause that there is a *bona fide* triable issue to be given leave to defend.
(p 414 c-g)

[2] The respondent herein had raised the issues that the appellants had acquiesced in the construction works undertaken by the new management

of the respondent, that the Contracts Act 1950 should be read into the SPA, that the completion date of the house in the peculiar circumstances of the case was not fundamental, that by the new arrangement between the parties the provision of s. 7 of the SPA that time was of the essence was rendered ineffective, and that the appellants by continually paying the installments of the purchase price had waived their right under the SPA. These are triable issues which either singularly or collectively constituted cause against the grant of summary judgment. (p 413 e-g)

[Appeal dismissed.]

Case(s) referred to:
Abdul Rahim Syed Mohd v. Ramakrishnan Kandasamy [1996] 3 CLJ 393 ***(refd)***
Aw Yong Wai Choo v. Arief Trading SB [1992] 1 MLJ 167 ***(refd)***
Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 ***(refd)***
Chye Fook & Anor v. Teh Teng Seng Realty SB [1989] 1 MLJ 308 ***(refd)***
Memphis Rogues Ltd v. Skalbania [1982] 38 BCLR 193 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***
SEA Housing SB v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ (Rep) 305 ***(refd)***
Syn Lee & Co Ltd v. Bank Of China [1961] MLJ 87 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 56
Housing Developers (Control Licensing) Regulations 1989, Sch G, reg 11(3)
Subordinate Courts Rules 1980, O. 26A

Reported by WA Sharif

JUDGMENT

Abdul Hamid Embong J:
On 2 November 2000 the learned sessions judge at Ipoh had dismissed with costs the appellants' application for summary judgment pursuant to O. 26A Subordinate Courts Rules. The appellants had claimed for liquidated damages in the sum of RM39,698.62 against the respondent for late delivery (of 644 days) of a house constructed by the respondent in a housing scheme project in Ipoh known as the Meru Valley Resort (the project). On 5 July 1995 the appellants had entered into a sale and purchase agreement (SPA) with the respondent in the form as provided under sch. G of the Housing Developers (Control and Licensing) Regulations 1989 made under the Housing Developers Act 1966 (the Act). The SPA was entered into with the previous management of the respondent company. The project was abandoned in November 1995 and the respondent company was taken over by a new set of shareholders in August 1997 who then revived the project. The construction of the houses including the appellants' were completed on or before 4 January 1999. It was

in evidence that the appellants had not objected to, but had in fact encouraged, the new management from taking over and completing the project. This had to be so as it was in the appellants' interest to see to the project's completion.

Clause 20(1) of the SPA had provided that the respondent handed over vacant possession to the appellants within 24 months of signing of the SPA. Vacant possession was delivered on 10 April 1999 and the respondent was thus, allegedly, responsible for delay of 644 days. Clause 7 of the SPA also provided. that time shall be of the essence in relation to all the provisions of the SPA.

The appellants contended that the Act is comprehensive and self contained, and that the respondent must strictly comply with the purpose of the Act which was enacted to protect the weaker party (purchasers). The respondent was therefore legally bound to operate within the parameters of the provisions of the Act, including the SPA which had been statutorily provided (schedule G). Further the parties cannot waive or contract out of the statutory agreement. (see *SEA Housing SB v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305). Only the controller of housing may alter or modify the terms of the SPA where there arise special circumstances, hardships or necessity calling for such modifications or alterations (see reg. 11(3)). Since, in this case the respondent had failed to obtain permission to waive or modify the SPA, as provided under the regulations, and is now out of time to do so, the respondent had failed to meet the purposive intent of the Act which is the protection of house purchasers, including the appellants. Learned counsel for the appellants also argued that the Contracts Act 1950 has no place in respect of contracts for the purchase of houses made under the Act and thus the former cannot be used as a shield to overcome the respondent's non-compliance of reg. 11(3). Learned counsel posed two legal questions for this court's determination, worded as such:

(i) Whether the developer (respondent) could put up a defence to an action by the appellant (purchaser) where the respondent (developer) had **first failed** to avail himself to a comprehensive statutory mechanism provided for in reg. 11(3) of the Housing Developers (Control Licensing) Act 1966 & Regulations 1989 and **omitted** to obtain a certificate for the waiver or modification of cll. 7, 20(1) and 20(2) of the schedule G statutory agreement.

In the event if the answer to (a) above is "Yes" then

(ii) Whether the provisions of Contracts Act 1950 can be imported into the statutory agreement to circumvent/curtail/defeat the operation of cll. 7, 20(1) and 20(2) when there has been prior non compliance of r. 11(3) by the respondent (developer).

The respondent took the stand that there are triable issues to be determined, and as such, summary judgment is inappropriate. Firstly it was submitted that the peculiar background of this case shows that the appellants had acquiesced in the construction works undertaken by the new management of the respondent company, and had led the respondent to believe that the appellants would not be claiming any compensation so long as the house was completed. It was also submitted that the provisions of the Contracts Act 1950 should be read into the SPA and that the completion of the house by a particular date was not fundamental. Further it was submitted that cl. 7 of the SPA (on time as the essence) was also rendered ineffective in view of the new arrangement by the parties. It was also submitted in the alternative, that the continued payments by the appellants of the instalments of the purchase price after the respondent's new management took over the stalled project, means that the appellants had waived their rights under the SPA.

In my view, the respondent had raised several issues which this court found to be triable and either singularly or collectively as showing cause against the grant of a summary judgment as sought by the appellants.

One is that the SPA made under the HD (C & L) Act need not be read alone but may be read together with the Contracts Act 1950 and as such, the application of the term that time shall be of the essence as provided under the terms of the SPA, could be interpreted to be of limited application only. Under s. 56 of the Contracts Act time in a contract for the sale of land, is of the essence in two main situations ie, (i) where the intention of the parties was such that time was such of the essence of the contract for the fulfillment of their respective obligations, and (ii) the nature of the subject matter or the surrounding circumstances are such that the time specified for the performance is of the essence (*Abdul Rahim Bin Syed Mohd v. Ramakrishnan Kandasamy* [1996] 3 CLJ 393).

Learned counsel for the respondent took the stand, with which I agree, that the SPA in this case in view of the peculiar background to the completion of this project, should not be read alone but also reference be made to the Contracts Act and the National Land Code, to determine the extent of the application of the time-clause in the SPA. Reference was made to the case of *Aw Yong Wai Choo v. Arief Trading SB* [1992] 1 MLJ 167 where it was held that a sale and purchase agreement made under the Act, even it found to be in breach of the rules made thereunder, could not be rendered illegal.

In the case of *Chye Fook & Anor v. Teh Teng Seng Realty SB* [1989] 1 MLJ 308, Abdul Malek J (now FCJ) discussed the rights of parties under a sale and purchase agreement situation where the contract stipulates that time be

of the essence and in particular the option opened to a purchaser under s. 56 of the Contracts Act and held that the remedies under the regulations were designed to improve and supplement the common law remedies.

Factually too, this court holds the view that the peculiar background of this case favours the respondent to disallow the appellants summary judgment. The respondent had also made a counter claim against the appellants for late payments of interest and general damages, which in my view needs to be determined at the trial of this suit.

For a summary judgment to be entered the court will have to be satisfied that the respondent hat not raised any *bona fide* triable issue. The approach this court takes is found in the words of Thompson CJ in *Syn Lee & Co Ltd v. Bank Of China* [1961] MLJ 87, stating:

> With great respect it seems to me there may have been some slight misapprehension on the part of the assistant registrar and on the part of the trial judge as to the proper approach. It is not quite the same as the problem with which we are always being faced in the chancery side of the court of trying issues on affidavit evidence. In a case of this sort, it is not a case of trying the issues on affidavit evidence, it is rather a question of deciding on affidavit evidence whether there is a *moral improbability of a very high degree that the defendant can possibly succeed.*
>
> On the other hand we have to remember that the order is there as much in the interests of defendants as in the interests of plaintiffs. It is in the interest of plaintiffs, that they should be able to get prompt judgment when there is no real defence. But, on the other hand, it is in the interest of defendants in such cases that plaintiffs should be able to get judgments not only expeditiously but economically. (emphasis added)

The underlined words above, when viewed conversely, show that only in cases of undoubted certaintly will a plaintiff succeed in obtaining a summary judgment.

In *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609, the Court of Appeal gave this reminder:

> It is important to bear in mind that O. 14 is a summary judgment procedure and not a summary trial procedure.

Thus, what the respondent needs to do, as they have successfully done in this case, is to show cause that there is a *bona fide* triable issue to be given leave to defend.

And the same court endorsed the principle from the case of *Memphis Rogues Ltd v. Skalbania* [1982] 38 BCLR 193 by quoting the following passage:

> The question has been stated in a number of ways: Is there no real substantial question to be tried? Is there no dispute as to facts of law which raises a reasonable doubt? Is it manifestly clear that the appellants are without a defence that deserves to be tried? Although cast in different terms, all point to the same inquiry, namely, is there a *bona fide* triable issue?

And, finally as regards the scope that the applicability of the summary judgment procedure be limited to virtually uncontested or uncontestable cases only, the Supreme Court had stated in *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14, in the judgment of Gunn Chit Tuan SCJ who said:

> The scope of O. 14 proceedings meant for cases which are virtually uncontested or uncontestable is now determined by the Rules of the High Court 1980. Generally where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a *bona fide* defence, he ought to have leave to defend. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases (see *Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd.* [1987] 2 MLJ 332; *Gunung Bayu Sdn. Bhd. v. Syarikat Pembinaan Perlis Sdn. Bhd.* [1987] 2 MLJ 332). It was held in the well-known House of Lords' case of *Jacobs v. Booth's Distillery Co* [1901] 85 LT 262 that a complete defence need not be shown. The defence need only show that there is a triable issue or question or that for some other reason there ought to be a trial, and leave to defend ought to be given. In fact, even though the defence is not clearly established, but only reasonable probability of there being a real defence, leave to defend should be given (*Manager v. Cash* [1889] 5 TLR 271).

The two legal question posed by the appellants need no answer for the moment. In my view they too formed part of the legal issues that needed to be determined at a full trial.

For the above reasons, this appeal is dismissed with costs.